IN THE

Supreme Court of the United States

October Term, 1958

No. 174

UNITED STATES OF AMERICA,

Petitioner,

v.

EMBASSY RESTAURANT, INC., *et al.*

BRIEF FOR THE AMALGAMATED CLOTHING WORKERS OF AMERICA, ITS PHILADELPHIA JOINT BOARD, AND THE AMALGAMATED INSURANCE FUND, AS *AMICI CURIAE*

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Jurisdiction

The jurisdiction of this Court is conferred by 28 U. S. C. Section 1254(1) and Section 64 of the Bankruptcy Act, as amended.

The Amalgamated Clothing Workers of America (hereinafter called the "Amalgamated"), of which the Philadelphia Joint Board is an affiliate, represents approximately 400,000 workers in the United States and Canada. Nearly all of these workers are covered under employee welfare and pension plans, established pursuant to collective bargaining agreements. These plans, almost all of which are industry-wide in scope, are supported solely by employer contributions to the various funds. The largest of these funds, the Amalgamated Insurance Fund, (hereinafter referred to as the "Fund") covers approximately 125,000 employees for welfare and retirement benefits. This Fund is jointly administered by representatives of the contributing employers and the Amalgamated.

The Amalgamated and the Fund have matters involving the questions herein posed pending before referees in the Second and Third Circuits, among others. The Philadelphia Joint Board was granted leave by the Court of Appeals below to file a brief and appear *amicus curiae*. Another affiliate of the Amalgamated, Local 126, has a similar question pending on appeal before that court. *Matter of Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J.).

For these reasons, consent to file and appear as *amici curiae* was obtained from the parties pursuant to Rule 42 of the Rules of this Court.

Question Presented

Are contributions to an employee welfare fund made by an employer on behalf of employees pursuant to a collective bargaining agreement entitled to a priority as "wages * * * due to workmen * * * " within the meaning of Section 64a(2) of the Bankruptcy Act?

Introduction and Summary of Argument

There are three material prerequisites for the establishment of a priority claim under Section 64a(2) of the Chandler Act. These are: that the claim must be for wages; that it must not "exceed $600 to each claimant * * * earned within three months before the date of the commencement of the proceedings"; and that it must be "due to workmen". We are here concerned with the satisfaction of but two of these requirements: first, do employer contributions to an employee welfare fund, under a collective agreement, constitute "wages" and, second, are such sums "due to workmen"? It is submitted that both questions should be answered in the affirmative.

It is undisputed that the contributions due from the bankrupt employer do not exceed $600 to each claimant,

that they were earned within the statutory three month period and that the employees whose services created the claim are workmen within the meaning of the Act. Accordingly, these matters are not treated in the argument.

As to the threshold question of whether the claim is for wages, it is shown that Congress for the purposes of Section 64a(2) of the Bankruptcy Act has always considered "wages" to be a generic term. As new and different methods and modes of compensating workmen for their labor have evolved, they have been uniformly held by the courts to constitute wages for the purposes of the Bankruptcy Act, and such interpretation has been affirmed by the Congress. Specific Congressional understanding of employer contributions to welfare funds as wages is shown by its treatment of such contributions as wages in the granting of express exemptions thereto in tax and other legislation. As welfare funds financed by employer contributions have expanded in number and scope with almost explosive force, employees, unions, employers, Congress and its committees and recognized authorities have universally agreed that such contributions are equivalent to wages paid in ready cash. Indeed, until 1955 the courts agreed with this general understanding. It is submitted that in the judicial conflict which has developed since that date, the opinion of the court below construing such contributions as "wages" is the correct interpretation, and should be affirmed.

As to the second question, it is submitted that once it is established that these contributions are "wages", they are as much "due to workmen" as any other form of compensation for the purposes of the Act.

ARGUMENT

POINT I

Employer contributions are "wages" within the meaning of Section 64a (2) of the Bankruptcy Act.

Section A: The Development of Federal Bankruptcy Legislation.

While the Congress of the United States first enacted a bankruptcy statute in the year 1800,[1] it was not until the adoption of the Bankruptcy Act of 1841 [2] that a provision granting a priority for unpaid wages, in the event of employer bankruptcy, first appeared in such legislation. Since the passage of the aforementioned statute in 1841, a priority for wages in an ever-increasing amount has been maintained by Congressional action for an unbroken period of 117 years. The priority granted in the Bankruptcy Act of 1841 was for an amount not exceeding $25 to "any person who shall have performed any labor as an operative in the service of any bankrupt" and provided further that such sum shall have been earned within six months next preceding the bankruptcy. In 1867,[3] the amount of this priority was increased to $50. The priority was again increased, to $300, in 1898,[4] and in 1906,[5] the class of employees whose wages were to enjoy this priority was widened. Section 15 of the Bankruptcy Act of 1926,[6] again increased the amount of the priority, said priority now amounting to $600. The passage of the Chandler Act,[7] in 1938, was the last full pronouncement of the Congress on bankruptcy. The Chandler Act advanced the priority for wages in the

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[1] Bankruptcy Act of 1800, c. 19, 2 Stat. 19, repealed by Act of December 19, 1803, c. 6, 2 Stat. 248.

[2] Act of August 19, 1841, c. 9, 5 Stat. 440.

[3] Bankruptcy Act of March 2, 1867, c. 176, 14 Stat. 517.

[4] Act of July 1, 1898, c. 541, 30 Stat. 544.

[5] Act of June 15, 1906, c. 3333, 34 Stat. 267.

[6] Act of May 27, 1926, c. 406, 44 Stat. 662.

[7] Act of June 22, 1938, c. 575, 52 Stat. 840.

scale of preference for distribution of the bankrupt's assets and again broadened the class of employees whose wages were to be accorded the priority. The most recent action by the Congress on this subject was in 1956,[8] when again the only action taken was the broadening of the definition of workmen.

It is important to note that while, during this period of more than a century, the Congress has, from time to time, reenacted, revised or amended the wage priority provision of the Bankruptcy Act, it has never, in any way, seen fit to define the term "wages" for the purpose of this priority.

We, therefore, submit that there is no need now for Congressional action in order to accord a priority to employer contributions to welfare funds, inasmuch as Congress, throughout the entire history of bankruptcy legislation, has given the term "wages" a generic meaning, and the term has been so applied by the courts.

Section B: The Development of Supplemental Forms of Compensation.

It cannot be questioned that employer contributions to welfare funds were not and could not have been contemplated by the Congress when the priority for wages was first created in 1841. Nor for that matter, could such items of compensation as paid vacations and severance pay have been contemplated at that time.[9a] It was not until much later, that these items of compensation, now popularly known as "fringe" benefits became a factor within the system of compensation by which workers are rewarded for their labor.

The great growth in economic fringe benefits to workers has come in the period since 1929,[9] the period

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[8] 11 U. S. C. § 104 (Supp. V 1952).

[9a] Paid vacations and severance pay have consistently been held by the courts to constitute "wages" under the Bankruptcy Act (see p. 9, *infra*).

[9] UNITED STATES DEPARTMENT OF LABOR, A GUIDE TO LABOR-MANAGEMENT RELATIONS IN THE UNITED STATES, March, 1958, § 2:09, p. 1.

which witnessed a parallel growth in trade union membership and expansion of collective bargaining. In 1929, when the cost of all fringe benefits constituted 3% of the total of wages and salaries paid by American employers, only three-tenths of one percent of the total wage bill was for paid vacations.[10] In 1957, on the other hand, when the cost of all fringes had grown to 18% of the wage and salary bill, 3.3% went to provide employees with paid vacations.[11]

During the last decade, we have witnessed a phenomenal growth of employer-supported health, welfare and pension programs. Of this growth, a Senate Committee had this to say (p. 2):

> "Man's quest for greater security spurred the introduction of welfare and pension programs. Wartime expansion, wage stabilization, favored tax treatment, an era of high prosperity and employment, and a desire for greater employer-employee harmony, all fanned by collective bargaining, caused their astonishing growth over the last decade." [12]

By 1956, no less than 62.8% of employees in the wage and salary force were covered by some form of life insurance and death benefits under an employee benefit plan, 62.8% by hospitalization and 58.6% received surgical benefits in the same manner.[13] From a total of 25 master group life insurance policies in effect in 1912, under which 12,000 certificates had been issued covering a total of $13,000,000 of insurance, this form of employee benefit had grown by 1954 to 81,000 master policies in force, under which

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[10] ECONOMIC RESEARCH DEPARTMENT, CHAMBER OF COMMERCE OF THE UNITED STATES, FRINGE BENEFITS 1957, July, 1958, table 21, p. 33.

[11] *Ibid.*

[12] SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, S. Rep. No. 1734, 84th Cong., 2d Sess., FINAL REPORT ON PENSION PLANS INVESTIGATION.

[13] Alfred M. Skolnick and Joseph Zinman, *Growth in Employee Benefit Plans*, UNITED STATES DEPARTMENT OF HEALTH, EDUCATION AND WELFARE, Social Security Bulletin, March, 1958, p. 4.

28,762,000 certificates had been issued, with a total insurance value of $86,395,000,000.[14] Of the millions of workers covered by collectively bargained health, welfare and pension plans, contribution by the employer only is required in the preponderance of union contracts.[15]

Where, as a result of collective bargaining, health, welfare and pension funds are established for the purpose of providing protection for the covered employees, employer contributions to such funds are regarded by both employer,[16] union and employee alike as compensation for labor performed as much as vacation pay, holiday pay, severance pay, etc.

As pointed out in Note, *Union Retirement and Welfare Plans: Employer Contributions as "Wages" under Section 64a(2) of the Bankruptcy Act*, 66 YALE L. J. 449:

> "They [labor representatives] recognized that these contributions had proved as appealing to many employees as direct wage increases. Furthermore, welfare plans enhanced the union's bargaining position and by giving unions alternative goals, added to their flexibility in negotiating for increased remuneration. *Unions and employees consequently seek and think of employer contributions as the equivalent of wages paid in ready cash.*" [p. 460, Emphasis supplied]

It is clear that to the employer such contributions represent a direct "labor cost" of his doing business just as real as the hourly or piece rate or other fringe benefits which have been held to constitute "wages" under the Bankruptcy Act; to the employee such contributions represent part of his pay which serve to provide him, and in many instances his dependents, with insurance protection,

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[14] See note 12, *supra*.

[15] Rowe, *Health Insurance and Pension Plans in Union Contracts*, 1955 MONTHLY LABOR REV., 993, 995.

[16] See footnote 10, *supra*.

and, as such, these contributions are a form of compensation just as real as the money received in the weekly pay envelope.

This changing concept of wages may be traced by means of a statistical analysis of the growth of such non-classical forms of compensation for labor performed as paid vacations, health, welfare and pension funds and the like. It may be seen as well in the published expressions of the attitudes of the employers who must pay the total wage bill, by the attitudes of the unions who negotiate the "wage package" and of employees who must rely on the protection provided by such contributions in a time of need. In addition, this development may also be found in case law which has arisen from the application of the Bankruptcy Act to economic reality, and its legislative history, as well as by other expressions of Congress.

Section C: Judicial Construction of Supplemental Forms of Compensation as "Wages".

An examination of the pertinent court decisions discloses a steady expansion of the term "wages" as applied to the varying forms of compensation which employees have received, and do receive, for services rendered.

It is well settled "that provisions of the Bankruptcy Act giving priority to claims for wages due employees are to be liberally construed",[17] that the word "wages" must be construed in its broader and more general sense as meaning compensation for services rendered,[18] and that the method and mode of computing the wages is of no relevance in determination of the priority.[19] Thus, "as new methods of computing and paying compensation for services rendered have come into use in commerce and industry over the

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[17] *Manly* v. *Hood*, 37 F. 2d 212, 214 (4th Cir.).
[18] *In re Dexter*, 158 Fed. 788 (1st Cir.).
[19] *In re Gurewitz*, 121 Fed. 982 (2d Cir.).

years, the content of 'wages' in § 64, sub. a(2) has likewise expanded ".[20]

Vacation pay has been held to be "wages".[21] *Division of Labor Law Enforcement* v. *Sampsell*, 172 F.2d 400 (9th Cir.); *In re Public Ledger, Inc.*, 161 F.2d 762 (3d Cir.); *In re Wil-Low Cafeterias, Inc.*, 111 F.2d 429 (2d Cir.); *In re Kinney Aluminum Co.*, 78 F. Supp. 565 (S. D. Cal.).

Severance pay, when brought to the attention of the courts, was uniformly held to fall within the definition of "wages." *Kavanas* v. *Mead*, 171 F. 2d 195 (4th Cir.); *In re Public Ledger, Inc., supra; In re Elliott Wholesale Grocery Co.*, 98 F. Supp. 1017 (S. D. Cal.), aff'd *sub nom, McCloskey* v. *Division of Labor Law Enforcement*, 200 F.2d 402 (9th Cir.).

Likewise, monies due as refunds to miners for their lamps have been held entitled to a wage priority claim. *Kavanas* v. *Mead, supra.* Similarly, back pay awards under the National Labor Relations Act have been held to be "wages" within the meaning of Section 64a(2), provided the other requirements of the Section were met. *National Labor Relations Board* v. *Killoran*, 122 F.2d 609 (8th Cir.), cert. denied, 314 U. S. 696; see also *Nathanson* v. *National Labor Relations Board*, 344 U. S. 25.

So we see, that it is agreed by the courts that "wages" are the compensation for services rendered irrespective of the mode or character which such compensation takes. Courts have given realistic meaning to new concepts and trends by assimilating the "fringe" benefits, which organized labor has gained for the working man at the bargaining table, into the term "wages".

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[20] *In re Otto*, 146 F. Supp. 786, 789 (S. D. Cal.)

[21] Even where there was no collective agreement, the District Court of Rhode Island, as far back as 1903, held vacation pay to be "wages" within the meaning of the Bankruptcy Act. *In re B. H. Gladding Co.*, 120 Fed. 709 (D. R. I.), reversed on other grounds, 124 Fed. 753 (1st Cir.).

At the present time, however, there is conflict among the Courts of Appeals as to whether monies due to a welfare fund, from a bankrupt employer, to provide life insurance, hospitalization and other benefits to the bankrupt's employees are "wages" as contemplated by Congress in the context of the Bankruptcy Act. It is submitted that the conflict between the decision of the Court of Appeals for the Second Circuit in *Local 140 Security Fund* v. *Hack* [22], and the decision of the Court of Appeals in the case at bar, arises solely from the failure of the Second Circuit to meet the threshold issue of whether such contributions constitute compensation for services rendered by workmen, and are, therefore, of necessity wages.[23]

The basis for the holding in the *Hack* case was that the employer contribution was not a debt owing to the individual employee; that the individual employee could not sue for arrearages and that the employee had no proprietary interest in the Funds. These objections are essentially directed to that portion of Section 64a (2) which requires that wages be "due to workmen" without first meeting the question of whether compensation for services, constituting "wages", are involved.[24] The Court in *United States* v.

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[22] 242 F.2d 375 (2d Cir.), cert. denied, 355 U. S. 833, rehearing denied, 27 U. S. L. WEEK 3113 (Oct. 14, 1958).

[23] It is important to note that prior to the issuance of *Matter of Brassel*, 135 F. Supp. 827 (N. D. N. Y.) in 1955 (the rational of *Brassel* was that of the *Hack* decision), referees in Bankruptcy consistently held that employer contributions to Union Welfare Funds were entitled to a wage priority. *Matter of Youth Star Sportwear*, Bankruptcy Cause No. 23003 (E. D. Pa.); *Matter of Westbury Stylists, Inc.*, Bankruptcy Cause No. 23058 (E. D. Pa.); *Matter of Mysie Sportswear*, Bankruptcy Cause No. 23755 (E. D. Pa.); *Matter of 534 Catering Corp.*, Bankruptcy Cause No. 84856 (S. D. N. Y.); *Matter of Charles Schreiber*, Bankruptcy Cause No. 55560 T (S. D. Cal.); *Matter of Barkey & Gay Furniture Co.*, Bankruptcy Cause No. 10008 (W. D. Mich.).

[24] Neither in *Matter of Brassel*, note 23, *supra*, nor in *Matter of Victory Apparel Mfg. Corp.*, 154 F. Supp. 819 (D. N. J.) was the definition of "wages" discussed.

Carter[25] has found in the affirmative on the question of whether the sums are in fact "due to" employees, thereby vitiating the rationale of *Local 140 Security Fund* v. *Hack, supra.*

This issue was, however, squarely met by the Third Circuit in its opinion below wherein the court said:

> "Union Funds providing welfare benefits to employees through employer contributions contracted for in collective bargaining agreements play an essential and evergrowing part in our industrial economy. We are firmly convinced that unions bargain for these contributions as though they were wages, and further that industry considers the contributions as an integral part of the wage package. See Note, 66 Yale L. J., 449, 460 (1957). The contributions are in a true sense the agreed compensation for services rendered and as such must be considered wages. (Footnote) For this reason we are constrained to disagree with the view of the Second Circuit in the Hack decision and to affirm the decision of the district court here."[26]

This threshold issue, the issue of whether welfare and pension contributions are "wages", was met equally well in *In re Otto,* 146 F. Supp. 786, 789 (S. D. Cal.), wherein the court said:

> "*An employer's contributions to a welfare fund for the benefit of employees and others,* payable in performance of an obligation of the employer under a collective bargaining agreement, and measured on the basis of a certain amount per hour worked by employees, *is but another method of computing and paying compensation for services rendered; and accordingly should be held to be 'wages' within the meaning of § 64, sub. a(2) of the Bankruptcy Act.*" [Cf: *McKey* v. *Paradise,* 299 U. S. 119; *In re Public Ledger, Inc.,* 161 F. 2d 762, 767 (3rd Cir.).] [Emphasis supplied]

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[25] 353 U. S. 210.

[26] 254 F.2d 475, 477-78 (3d Cir.).

While it is true that the employee cannot demand the cash value of the employer contributions, it is nevertheless a fact that employer contributions constitute compensation for services rendered by employees. It is the valuable right to the present benefit of protection and the future payment of claims, which the employee purchases by his labor. Certainly, the Bankruptcy Act does not circumscribe the manner in which the employee may spend his compensation. It is not for bankruptcy court "to differentiate between compensations to be used for different purposes". *In re Otto, supra* at 790.

Thus, contributions by an employer under a collective agreement to a welfare fund constitutes nothing less than compensation for services rendered, and as such, are "wages".

Section D: Legislative Intent, and the Meaning of the "Wages" Under 64a(2) of the Act.

A survey of Congressional action demonstrates that Congress intended a generic definition of the term "wages", so as to expand the priority.

As was heretofore demonstrated, despite the fact that the courts have consistently given liberal construction to the term "wages",[27] Congress, in the entire history of bankruptcy legislation, has not seen fit to contract the wage priority.[28] On the contrary, in its last full pronouncement on bankruptcy in 1938,[29] Congress advanced "wages" from fourth to second priority, and at the same time broadened the class to whom the priority was to be accorded. It should be noted, that prior to this, federal taxes enjoyed the place in the scale of priority presently occupied by "wages". Federal taxes are now relegated to the fourth priority, formerly accorded to "wages".

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[27] *Supra*, pp. 8-12.
[28] *Supra*, pp. 4-5.
[29] Note 7, *supra*.

Congress made these changes in the Bankruptcy Act after it had provided in 1935 for a uniform and comprehensive plan for unemployment compensation to workers discharged through no fault of their own, whatever the cause.[30] Not only did Congress fail to delimit or proscribe the definition of the term "wages" in 1938, but instead strengthened the priority, and has since further extended its scope.[31] Under these circumstances, while the Congress may well have intended to strictly limit its protection to those classes of employees enumerated in the Act,[32] it cannot be argued that a corresponding limitation of the wage priority to classical forms of compensation was intended. Thus, it would appear that Congress, by failing to define or delimit the term "wages", desired to provide for the continued expansion of the term "wages", so that it would have realistic meaning.

In seeking to persuade the Court, Petitioner presents the argument that since such contributions are not taxable income, nor treated as wages under certain provisions of the Internal Revenue Code of 1954,[33] they cannot be treated as "wages" for the purpose of this statute. Congress, however, expressly exempted such contributions from the definition of wages under the Social Security Act[34] and Federal Unemployment Tax Act.[35]

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[30] Act of August 14, 1935, c. 531, 49 Stat. 626.

[31] Between 1938 and 1958, the Chandler Act was amended more than twenty-five times. Of these changes, four dealt with Section 64. The most recent amendment to Section 64 was made in 1956. See note 8, *supra*.

[32] 3 COLLIER, BANKRUPTCY § 64.02 at p. 2058 (14th Ed. 1941); *In re Paradise Catering Corp.*, 36 F. Supp. 974 (S. D. N. Y.); *In re Estey*, 6 F. Supp. 570 (S. D. N. Y.).

[33] 26 U. S. C. § 106 (Supp. IV 1952).

[34] 26 U. S. C. § 3121(a) (Supp. IV 1952).

[35] 26 U. S. C. § 3306(b)(2) (Supp. IV 1952).

For the purposes of the Social Security Act wages are defined as:

> "* * * all remuneration for employment including the cash value of all remuneration paid in any medium other than cash * * *."

However,

> "* * * the amount of any payment (including any amount paid by an employer for insurance or annuities or into a fund, to provide for any such payment) made to, or on behalf of, an employee or any of his dependents under a plan or system established by an employer which makes provision for his employees generally (or for his employees generally and their dependents) or for a class or classes of his employees (or for a class or classes of his employees and their dependents), or account of—
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> (A) retirement, or
>
> (B) sickness or accident disability, or
>
> (C) medical or hospitalization expenses in connection with sickness or accident disability, or
>
> (D) death * * *".

is expressly excepted from wages within the meaning of that Act.[36] Similarly, contributions by an employer to welfare plans are expressly exempted from the definition of gross income for income tax purposes under the Internal Revenue Code of 1954,[37] and for the purposes of the Federal Unemployment Tax Act[38] employer contributions into a fund for employee welfare and retirement benefits are exempted from taxation. Thus, we see that when Congress desired to remove employer contributions to welfare funds from the meaning of wages, it has expressly done so.

As Mr. Chief Justice Marshall pointed out in *Brown* v. *Maryland*, 12 Wheat. 419, 438 (U. S.):

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[36] See note 34, *supra*.
[37] See note 33, *supra*.
[38] See note 35, *supra*.

> "* * * a rule of interpretation to which all assent [is] that the exception of a particular thing from general words, proves that, in the opinion of the lawgiver, the thing excepted would be within the general clause had the exception not been made * * *."

Clearly then, in enacting the specific exemptions above, Congress indicated its belief that employer contributions to welfare and retirement funds are "wages" unless expressly so exempted.

Surely it cannot be argued that by exempting such contributions from taxation as "wages" under other statutes, Congress intended to exclude such contributions as "wages" under the Bankruptcy Act. To give weight to such an argument is to establish a novel and tortured rule of legislative construction. Whatever weight there is to be given to the fact that the contributions herein are exempt from taxation under other federal statutes, it must be that Congress saw fit as a matter of public policy to encourage the expansion of pension and insurance plans, and not to revise the generic definition of the term "wages" under the Bankruptcy Act.

On the other hand, if one were to look to other statutes for the purpose of defining "wages" in bankruptcy, one would do well to look to the National Labor Relations Act,[39] or for that matter, to a recent report of a sub-Committee of the United States Senate charged with the respon-

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[39] Act of July 5, 1935, c. 372, 49 Stat. 449. In *Inland Steel Co.* v. *National Labor Relations Board*, 170 F.2d 247 (7th Cir.), cert. denied, 336 U. S. 960, the Court held an insurance and retirement plan to be encompassed within the term "wages" upon which an employer is required to bargain under Sections 8(b) and 9(a) of the National Labor Relations Act, 49 Stat. 449 (1935), as amended 29 U. S. C. §§ 151-68 (1952). See also *Cross & Co.* v. *National Labor Relations Board*, 174 F.2d 875 (1st Cir.).

sibility of investigating the operation of welfare funds,[40] or better still to the legislative history of the recently enacted Welfare and Pension Plans Disclosure Act,[41] wherein such statements as the following may be found:

> "Regardless of the form they take, the employers' share of the cost of these plans or the benefits the employers provide are a form of compensation."[42]

In sum, because the courts have consistently given a liberal interpretation to the term "wages", and because Congress has steadily expanded the priority and its purpose, wages in bankruptcy must be defined generically, as compensation for services rendered. Accordingly, employer contributions to health, welfare and pension plans should be considered as "wages".

POINT II

Employer contributions to a fund established to provide welfare benefits to employees are wages "due to workmen" within the meaning of the Bankruptcy Act.

In *United States* v. *Carter*, 353 U. S. 210, it was held that for purposes of the Miller Act,[43] employer contributions to a welfare fund under a collective agreement are "due to" the employees upon whose behalf they are made.

This Court, in that case, concluded that employer contributions, owing under a collective agreement, were no less "due to" workmen because the employee, through his col-

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[40] See note 12, *supra*.

[41] P. L. No. 85-836, 72 Stat. 997; see 1958 U. S. CODE CONG. AND ADMIN. NEWS 4813-86.

[42] *Ibid.*, p. 4815, S. REP. No. 1440, 85th Cong., 2d Sess.

[43] 40 U. S. C. § 270b(a) (1952).

lective bargaining agent, has seen fit to have a portion of his compensation paid directly to a trust fund, established for his exclusive benefit to provide him with insurance protection. The fact that such protection was provided through a collective agreement, rather than an individual wage assignment, was not considered relevant.[44]

In that case, this Court had before it an issue similar to the one in the instant case, and the relevant words were essentially identical to those in 64a(2) of the Bankruptcy Act.

Section 2(a) of the Miller Act provides that:

> "Every person who has furnished labor or material in the prosecution of the work provided for in such contract * * * *and who has not been paid in full therefor* * * * shall have the right to sue on such payment bond * * * *for the sum or sums justly due him.*" (Emphasis supplied.)

In the *Carter* case, a collective agreement between a union representing the defendant's laborers and several employer associations, one of whom represented the defendant, provided for employer contributions to the trustees of a health and welfare fund for the covered employees. The contractor failed to make these contributions, and the trustees of the fund sued the surety on the payment bond.

In reply to the surety's argument that the employees had been paid in full, this Court pointed out that the contributions were a part of the consideration for services rendered, and until the contributions were made the employees were not "paid in full", as required by that statute.

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[44] It is settled that a worker may assign wages, and the assignee may exercise the priority for wages in the event of bankruptcy of the assignor's employer. *Shropshire, Woodliff & Co.* v. *Bush*, 204 U. S. 186. See also, *In re Ross*, 117 F. Supp. 346 (N. D. Cal.).

When the surety argued that the trustees were neither the persons who had furnished labor or material, nor are they seeking sums "justly due" to persons who furnished the labor or materials, the Court said:

> "If the assignee of an employee can sue on the bond, the trustees of the employees' fund should be able to do so. Whether the trustees of the fund are, in a technical sense, assignees of the employees' rights to the contributions need not be decided. Suffice it to say that the trustees' relationship to the employees, as established by the master labor agreements and the trust agreement, is closely analogous to that of an assignment. The master labor agreements not only created Carter's obligation to make the specified contributions, but simultaneously created the right of the trustees to collect those contributions on behalf of the employees. The trust agreement gave the trustees the exclusive right to enforce payment. The trustees stand in the shoes of the employees and are entitled to enforce their rights.
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> "Moreover, the trustees of the fund have an even better right to sue on the bond than does the usual assignee since they are not seeking to recover on their own account. The trustees are claiming recovery for the sole benefit of the beneficiaries of the fund, and those beneficiaries are the very ones who have performed the labor. The contributions are the means by which the fund is maintained for the benefit of the employees and of other construction workers. For purposes of the Miller Act, these contributions are in substance as much 'justly due' to the employees who have earned them as are the wages payable directly to them in cash." (pp. 219-20).

Although this Court in the *Carter* case had before it a trust instrument expressly providing that the contributions "shall not constitute or be deemed wages", it considered these contributions "a part of the compensation for the work to be done by Carter's employees," and, therefore,

in the nature of "wages payable directly to [employees] in cash". The sole test which the courts in bankruptcy have applied in determining whether supplemental forms of compensation were to be construed as "wages" has been whether in fact they constituted compensation for services rendered. It was on this basis that the Court of Appeals below, and the court in *In re Otto, supra,* found contributions such as herein involved to be "wages".

As we have shown (see *supra,* pp. 12-16), Congress has seen fit to expand the purpose of the wage priority not only by express action, but also by its implied ratification, of the generic construction of the term by the courts. In our view, the recognition by this Court in the *Carter* case that contributions, such as are herein involved, are compensation for services rendered by employees, that such contributions are earned by the employees, that such contributions are due to the employees, and that the employees have a definite proprietary interest in both the contributions and funds themselves, applies equally to the instant case so as to support a priority under Section 64a(2) of the Bankruptcy Act.

CONCLUSION

For the reasons stated in this brief it is respectfully submitted that the decision of the Court of Appeals below should be affirmed.

Respectfully submitted,

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